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No. 85-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC ASSOCIATION, INC.,
Cross-Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

The issue presented by this cross-petition[1] is whether plaintiff association has standing to assert the individual claims of its members under the Interstate Land Sales Full Disclosure Act (Land Sales Act), 15 U.S.C. §§ 1701 et. seq., or under the Racketeering Influential and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq.

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[1] To avoid confusion between "Petitioner" and "Respondents" on this cross-petition, we shall refer to the parties as they were designated in the District Court.

The lengthy summary of the Complaint contained in plaintiff's cross-petition provides little assistance in answering that legal question. Presumably, the goal is to embarrass defendants with a recitation of plaintiff's grandiose claims, the merits of which defendants vigorously deny. The only facts necessary to resolve this case are clearly set forth in the opinions of the District Court and the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Cross Petition Presents No Issues Of Significant Or Recurring Importance.

The cross petition seeks review of the circumstances under which a corporation or association may assert the individual claims of its shareholders/members. Unlike the issues raised by defendants' petition, that issue does not require the attention of this Court.

The general rule prohibiting a litigant from asserting the rights of another is well settled. *Singleton v. Wulff,* 428 U.S. 106, 113-114 (1976). In *Warth v. Seldin,* 422 U.S. 490 (1975), and *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977), this Court clearly set forth the exceptional circumstances in which an association may assert the individual rights of its members. The cross-petition thus involves no new legal principle; merely the application of settled law to the specific facts of this case. Such an issue is inherently unworthy of this Court's review.

II. Plaintiff's Arguments Clearly Establish The Absence Of Any Issue Of Significant Or Recurring Importance.

Defendants will briefly address the specific reasons plaintiff asserts for granting the cross-petition.

A. The Relationship Between the Petition and the Cross-Petition.

The principal issue raised by defendants' petition is whether detrimental reliance is a necessary element of a fraud-based RICO claim. Plaintiff acknowledges that this question is "an important issue of federal law that can be resolved under the facts of this case." Br. in opposition, at 6. Plaintiff claims that resolution of that issue also requires this Court to determine whether an association has standing to assert the rights of its members under the Land Sales Act.

Since the two issues have nothing to do with each other, plaintiff has invented the following tortured chain of "logic":

1. The Court of Appeals allowed plaintiff to assert the individual RICO claims of its members;

2. Defendants have petitioned for a writ of certiorari to review that adverse finding;

3. As a matter of judicial economy, this Court should also consider plaintiff's standing to assert individual claims under the Land Sales Act.

The premise of this argument is false. The Court of appeals did not hold that plaintiff had standing to assert the individual RICO claims of its members. Quite the contrary:

> "On appeal, the Association does not contest the District Court's finding that it lacks associational standing to pursue the RICO count *on behalf of its members*". (emphasis original)

App. at A-9. Since that ruling was favorable to the defendants, they did not — indeed could not — petition this Court to review it.

The Association now claims that the Court of Appeals misunderstood its position, and this Court should grant certiorari to correct the mistake. The appropriate relief for this sort of housekeeping detail is a petition for rehearing in the Court of Appeals — not review by this Court. No such petition was filed.

B. Associational Standing Under the Land Sales Act

Plaintiff contends that it may assert the individual claims of its members under the Land Sales Act, despite the inherently individual nature of the proof required by the statute. Plaintiff urges that this sweeping judicial revision would serve the "remedial purpose" of the statute.

The third part of the *Hunt* test examines whether the claim asserted and the relief requested require individual proof. 432 U.S. at 343-44. The Land Sales Act specifically requires individual proof to determine the proper remedy:

> "In a suit authorized by this subsection, the Court may order damages, specific performance, or such other relief as the Court deems fair, just, and equitable. In determining such relief the Court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased."

15 U.S.C. §1709(a). These issues are necessarily individual. That is precisely why the Court of Appeals determined that the Association did not satisfy the strict requirements for representational standing. App. at A-6-8.[2]

The Association does not challenge that conclusion. Instead, it asks this Court to dispense with the individual requirements enacted by Congress, and to construct instead a broad-brush injunctive remedy based solely on proof of a developer's violations, regardless of the purchasers' circumstances or the equities of the situation. Plaintiff attempts to justify the judicial legislating it seeks by appealing to the "broad remedial purposes" of the Land Sales Act. This Court has repeatedly refused such invitations:

> "Where the principal express civil remedy for misstatements in reports. . .is by its terms limited to purchasers and sellers of securities, we are extremely reluctant

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[2] The Association acknowledges that the same standard governs its rights to assert RICO claims on behalf of its members. Pet. at 8.

> to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide.
>
> . . . Generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly that its language and the statutory scheme reasonably permit.' "

Touche, Ross & Co. v. Redington, 442 U.S. 560, 574-578 (1979).

The only case authority cited by Plaintiff is a New Jersey decision interpreting the New Jersey Condominium Act, the terms of which authorize a Condominium Association to sue on behalf of its members. The Land Sales Act contains no such provision. The remedy which it does contain, however, requires individual proof and precludes associational standing in this case.

C. The Application of Warth and Hunt.

Plaintiff asserts that the Court of Appeals improperly applied *Warth* and *Hunt* because significant individual participation is not required to establish liability, and because "prospective equitable relief" can never require extensive individual proof. This contention simply ignores the rationale of the Court of Appeals' holding.

The Court of Appeals held that the "prospective equitable relief" authorized by the Land Sales Act necessarily requires individualized proof. App. at A-6-8. Plaintiff apparently believes that any prayer for prospective equitable relief automatically dispenses with the necessity for individual proof. Under this view, the sole inquiry is the label plaintiff attaches to his prayer for relief, rather than the nature of the proof required to obtain it.

Warth and *Hunt* are not susceptible to that type of mechanical application. Rather, both cases require a functional

analysis of the kind of proof required to grant the relief at issue. See, e.g., *Massachusetts Hospital Association, Inc. v. Harris*, 500 F. Supp. 1270, 1276 (D. Mass. 1980). Even in the context of a prohibitory injunction, this Court has rejected associational standing when individual proof was necessary to establish the propriety of that relief. *Harris v. McRae*, 448 U.S. 297, 329 (1980).

The "prospective equitable relief" sought here is specific performance under the Land Sales Act. A District Court could not possibly satisfy its duty to consider the statutory criteria for such relief without extensive individual participation. As a result, associational standing is wholly inappropriate.

CONCLUSION

For the foregoing reasons, Defendants Cross-Respondents respectfully pray that the Court deny the cross petition for certiorari.

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